

This Opinion is not a  
Precedent of the TTAB

Mailed: March 9, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re Patch Boys International LLC*  
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Serial No. 90242361  
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David S. McDaniel and Jeremy D. Bisdorf of Jaffe, Raitt, Heuer & Weiss, P.C,  
for Patch Boys International LLC.

David A. Hutchison, Trademark Examining Attorney, Law Office 123,  
Susan Hayash, Managing Attorney.

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Before Lykos, Goodman and Dunn,  
Administrative Trademark Judges.

Opinion by Goodman, Administrative Trademark Judge:

Patch Boys International LLC (“Applicant”) seeks registration on the Principal



Register of the composite mark for “Drywall contractor services;  
General construction contracting” in International Class 37.<sup>1</sup>

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<sup>1</sup> Application Serial No. 90242361 was filed on October 8, 2020, based upon Applicant’s assertion of a bona fide intention to use the mark in commerce under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b). PATCH is disclaimed. Applicant provided the following description of the mark: “The mark consists of the stylized words ‘The PATCH BOYS’, with

The Trademark Examining Attorney has refused registration of Applicant's mark under Trademark Act Section 2(d), 15 U.S.C. § 1052(d), on the ground that Applicant's mark so resembles the following Principal Register marks: PATCHMAN<sup>2</sup>



(in standard characters) and ,<sup>3</sup> both owned by the same individual, for

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'PATCH BOYS' located under the word 'The,' directly to the right of a drywall joint knife image, and within a space that resembles drywall plaster."

Page references to the application record refer to the online database of the USPTO's Trademark Status & Document Retrieval (TSDR) system. References to the briefs on appeal refer to the Board's TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable. Applicant's brief is at 6 TTABVUE and the reply brief at 9 TTABVUE. The Examining Attorney's brief is at 8 TTABVUE.

The Examining Attorney has objected to Applicant's reference in its brief of Registration No. 6639074, its recently registered (February 8, 2022) design mark, , for "general construction contracting" in International Class 37. Applicant's brief, 6 TTABVUE 3; Examining Attorney's brief, 8 TTABVUE 5. The Examining Attorney submits that the registration "should be granted no consideration in the instant appeal with the exception of for the purposes of discussing its distinctiveness and distinguishing it from applicant's earlier registration as set forth, *infra*." Examining Attorney's brief 8 TTABVUE 5.

However, we cannot sustain the Examining Attorney's objection, and on one hand, consider the registration not of record for purposes of Applicant's arguments, but, on the other hand, consider the registration of record for purposes of the Examining's Attorney's arguments. Therefore, the objection is overruled, and we consider this registration stipulated into the record.

<sup>2</sup> Registration Nos. 4810864 issued September 15, 2015, Section 8 affidavit accepted. When the registration was initially cited, additional services were listed which have since been deleted upon acceptance of the Section 8 affidavit.

<sup>3</sup> Registration No. 5673997 issued February 12, 2019. The description of the mark reads as follows: "The mark consists of a stylized man with a mustache appearing in front of a circle design. The man is wearing a cap and overalls, and is pointing with his right hand while holding a trowel in his left hand. A rectangle with rounded corners appears below the stylized man and contains the stylized wording 'PatchMan'." Color is not claimed as a feature of the mark.

respectively, International Class 37: “building construction; remodeling and repair,” and “Building construction, remodeling and repair; Building maintenance and repair,” as to be likely, when used in connection with the identified services, to cause confusion, to cause mistake, or to deceive.

When the refusal was made final, Applicant appealed and requested reconsideration. After the Examining Attorney denied the request for reconsideration, the appeal was resumed. We reverse the refusal to register.

### I. Likelihood of Confusion

Section 2(d) of the Trademark Act prohibits registration of a mark that so resembles a registered mark as to be likely, when used on or in connection with the goods or services of the applicant, to cause confusion, or to cause mistake, or to deceive. 15 U.S.C. § 1052(d). Our determination of likelihood of confusion under Section 2(d) is based on an analysis of all probative facts in the record that are relevant to the likelihood of confusion factors set forth in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). *See also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). We consider each *DuPont* factor for which there is evidence and argument. *See, e.g., In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019); *In re Country Oven, Inc.*, 2019 USPQ2d 443903, at \*2 (TTAB 2019).

In every Section 2(d) case, two key factors are the similarity or dissimilarity of the marks and the goods or services. *See In re i.am.symbolic, LLC*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*,

308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”). These factors, and others, are discussed below.

We focus our analysis on the cited standard character registration PATCHMAN.<sup>4</sup> While both cited registrations do not list identical services, the services they have in common are related to Applicant’s services. A finding of no likelihood of confusion



between Applicant’s mark and the standard character mark PATCHMAN means we also would not find likelihood of confusion as to the registered PATCHMAN design mark cited by the Examining Attorney. *See In re Allegiance Staffing*, 115 USPQ2d 1319, 1325 (TTAB 2015) (“if there is no likelihood of confusion between Applicant’s mark and ALLEGIS in standard characters, then there would be no likelihood of confusion with the other ALLEGIS marks.”); *In re Max Capital Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010). Therefore, in this decision, we refer to PATCHMAN (Registration No. 4810864) as the cited mark.

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<sup>4</sup> The Examining Attorney’s focus in the Office Actions and in the brief is on the standard character PATCHMAN mark, although the Examining Attorney does make one brief mention about the “joint knife” in Registrant’s word and design mark. Examining Attorney’s brief, 8 TTABVUE 8-11.

A. Strength of the Registered Mark and Similarity or Dissimilarity of the Marks

We consider Applicant's contention that "PATCH marks – already weak in the construction industry due to descriptiveness – are even further weakened by extensive use"<sup>5</sup> such that its applied-for mark can coexist with the cited registration. *See In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at \*3 (TTAB 2020) ("an analysis of the similarity between marks may include an analysis of the conceptual strength or weakness of the component terms and of the cited mark as a whole"). *See also In re Smith and Mehaffey*, 31 USPQ2d 1531, 1533 (TTAB 1994) ("the descriptiveness or suggestiveness of a mark or portion of a mark may result in what is sometimes termed a more narrow scope of protection").

"A mark's strength is measured both by its conceptual strength (distinctiveness) and its marketplace strength (secondary meaning)." *In re Chippendales USA, Inc.*, 622 F.3d 1346, 96 USPQ2d 1681, 1686 (Fed. Cir. 2010). In determining the strength of the cited mark, we consider inherent strength, based on the nature of the mark itself.<sup>6</sup> *New Era Cap. Co. v. Pro Era LLC*, 2020 USPQ2d 10596, at \*10 (TTAB 2020); *Top Tobacco, L.P. v. N. Atl. Operating Co.*, 101 USPQ2d 1163, 1171-72 (TTAB 2011)

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<sup>5</sup> Applicant's brief, 6 TTABVUE 11.

<sup>6</sup> There is no evidence of commercial strength in the record. Fame, or commercial strength, under the fifth *DuPont* factor is treated as neutral in ex parte proceedings because in an ex parte appeal, the owner of the cited registration is not a party, and the examining attorney is under no obligation to demonstrate exposure to or recognition of the cited mark in the marketplace. *See In re Integrated Embedded*, 120 USPQ2d 1504, 1512 (TTAB 2016); *In re Thomas*, 79 USPQ2d 1021, 1027 n.11 (TTAB 2006) (fame is not normally a factor in ex parte proceedings). TRADEMARK MANUAL OF EXAMINING PROCEDURE ("TMEP") § 1207.01(d)(ix) (July 2022).

(the strength of a mark is determined by assessing its inherent strength and its commercial strength). In tandem, if there is evidence in the record, we consider whether the mark has commercial weakness in the marketplace. *DuPont*, 177 USPQ at 567 (The sixth *DuPont* factor considers “the number and nature of similar marks in use on similar goods.”).

To determine the conceptual strength of the cited mark, we evaluate its intrinsic nature, that is, where it lies along the generic-descriptive-suggestive-arbitrary-fanciful continuum of words. *See generally, Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 54 USPQ2d 1065, 1068 (2000) (word marks registered without a claim of acquired distinctiveness that are arbitrary, fanciful or suggestive are “held to be inherently distinctive.”); *In re MBNA Am. Bank, N.A.*, 340 F.3d 1328, 67 USPQ2d 1778, 1780 (Fed. Cir. 2003) (citing *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 23 USPQ2d 1081, 1083 (1992)).

We note that the cited PATCHMAN mark is inherently distinctive because it registered on the Principal Register without a claim of acquired distinctiveness. *Tea Bd. of India v. Republic of Tea, Inc.*, 80 USPQ2d 1881, 1889 (TTAB 2006) (a “mark that is registered on the Principal Register is entitled to all Section 7(b) presumptions including the presumption that the mark is distinctive and moreover, in the absence of a Section 2(f) claim in the registration, that the mark is inherently distinctive for the [services]”). Nonetheless, we may consider whether an inherently distinctive mark is “weak as a source indicator” in the course of a *DuPont* analysis. *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1517-18 (TTAB 2016).

In connection with evaluating the cited mark's conceptual strength, active third-party registrations may be relevant to show that a mark or a portion of a mark is descriptive, suggestive, or so commonly used in a particular industry that the public will look to other elements to distinguish the source of the services. *See Juice Generation, Inc. v. GS Enters. LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674-75 (Fed. Cir. 2015). *See also Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (“[E]vidence of third-party registrations is relevant to ‘show the sense in which . . . a mark is used in ordinary parlance.’”); *In re Guild Mortg. Co.*, 2020 USPQ2d 10279, at \*3 (same); *In re Dayco Products-Eagle Motive Inc.*, 9 USPQ2d 1910, 1911-12 (TTAB 1988); *EZ Loader Boat Trailers, Inc. v. Cox Trailers, Inc.*, 213 USPQ 597, 601 (TTAB 1982).

Thus, third-party registrations can be used in the manner of dictionary definitions to show that a term has some significance in a particular field. *See Tektronix, Inc. v. Daktronics, Inc.*, 534 F.2d 915, 189 USPQ 693, 694-95 (CCPA 1976) (even if “there is no evidence of actual use” of third-party registrations, such registrations “may be given some weight to show the meaning of a mark in the same way that dictionaries are used”); *In re Melville Corp.*, 18 USPQ2d 1386, 1388 (TTAB 1991); *Plus Products v. Star-Kist Foods, Inc.*, 220 USPQ 541, 544 (TTAB 1983).

Applicant made of record 29 third-party registrations for PATCH-formative marks in connection with building materials for construction and repair, drywall repair goods, general construction contracting services, drywall repair services, and in

addition, its own claimed prior registration.<sup>7</sup> Some of these marks registered on the Supplemental Register, some registered under Section 2(f) on the Principal Register, some registered with disclaimers of “patch,” and some registered without a Section 2(f) claim or a disclaimer.<sup>8</sup> Three of the PATCH-formative registrations, including Applicant’s prior registration, identify services:

Registration No.	Mark	Services
Reg. No. 4862197	THE PATCH BOYS	general construction contracting <sup>9</sup>
Reg. No. 3138311	PATCHES IN A DAY	one day drywall repair
Reg. No. 2564801	QUIKPATCH	drywall repair services

The remaining third-party PATCH-formative registrations for building, repair, and patching goods in the construction field include the following:<sup>10</sup>

Registration No.	Mark	Goods
Reg. No. 5544635	PIRATE PATCH	various drywall coatings
Reg. Nos. 529429334/5298593	PATCHPOUCH	drywall repair kits
Reg. No. 2137106	STRONG-PATCH	drywall repair patch

<sup>7</sup> May 31, 2022 Request for Reconsideration at TSDR 13-41. None of the third-party registrations are for marks that include the term “man.” Applicant also submitted four pending applications for PATCH-formative marks. However, pending applications are evidence only that the applications were filed on a certain date. *In re Mr. Recipe, LLC*, 118 USPQ2d 1084, 1089 (TTAB 2016). Unlike registrations, they are not evidence of the weakness of a mark or a portion of a mark.

<sup>8</sup> We note that the marks that registered on the Principal Register without disclaimers or Section 2(f) claims are hyphenated or combined terms.

<sup>9</sup> Registration No. 4862197 issued December 1, 2015.

<sup>10</sup> For registrations covering goods, only the most relevant goods are identified in this list.

Registration No.	Mark	Goods
Reg. No. 4452457	FASTPATCH	plaster-based patching compound
Reg. No. 972712	PLASTER PATCH	patching plaster for patching cracks and breaks in plaster
Reg. No. 2030324	PRESTO PATCH	plaster based patching compound for interior walls and ceilings
Reg. No. 2886560	READY PATCH	spackling and patching compound for interior and exterior surfaces
Reg. No. 4553521	PATCH & PRIME	spackling compound
Reg. No. 2591270	PATCH STICK	spackling compound
Reg. No. 988625	PATCH-A-WALL	spackling compound
Reg. No. 2403945	PATCH-N-PAINT	spackling compound

In addition, during prosecution, the Examining Attorney submitted a dictionary definition for PATCH which is defined as “a piece of material used to mend or cover a hole or spot.”<sup>11</sup>

Consistent with the dictionary definition, the third-party registrations demonstrate the highly descriptive significance of the term PATCH as used in connection with drywall contracting and drywall repair services and related goods. *See In re Ginc UK Ltd.*, 90 USPQ2d 1472, 1475 (TTAB 2007) (dictionary references and third-party registrations “demonstrate the descriptive/generic significance of

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<sup>11</sup> MERRIAM-WEBSTER DICTIONARY, merriam-webster.com March 18, 2021 Office Action at TSDR 8. The Examining Attorney referenced Applicant’s website that states Applicant has an “award winning process” for rapidly patching “holes in your home’s walls.” March 18, 2021 Office Action at TSDR 11.

‘togs’ and provide further evidence that purchasers would attribute the ordinary dictionary meaning of ‘togs’ to applicant’s clothing”). The Examining Attorney acknowledges the descriptiveness of the term PATCH in connection with Registrant’s identified services.<sup>12</sup>

Applicant also submitted third-party use evidence of fifteen PATCH-formative marks or trade names used in connection with construction services.<sup>13</sup> Evidence of third-party use of similar marks or portions of marks for the same or similar services is relevant to a mark’s commercial strength or weakness. *In re i.am.symbolic, LLC*, 123 USPQ2d at 1751 (“third-party use bears on strength or weakness” of mark) (citation omitted); *Brooklyn Brewery Corp. v. Brooklyn Brew Shop, LLC*, 2020 USPQ2d 10914, at \*17 (TTAB 2020) (six local Brooklyn-formative named establishments’ use of the term “Brooklyn” in connection with beer sales have significant probative value as to commercial weakness), dismissed in part, *aff’d* in part, vacated in part, and remanded, 17 F.4th 129, 2021 USPQ2d 1069 (Fed. Cir. 2021); *In re FabFitFun, Inc.*, 127 USPQ2d 1670, 1674 (TTAB 2018); *Tao Licensing LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017) (considering United States third-party use (webpages) of “TAO-formative names” in connection

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<sup>12</sup> Examining Attorney’s brief, 8 TTABVUE 9, 14, 16 (“both marks use the descriptive wording ‘PATCH’”); (“registrant’s mark is strong despite the use of a descriptive word [PATCH]”); (“as with the third-party registrations submitted by applicant and discussed, supra, only a minimal amount of such marks feature a combination of the “PATCH” descriptive wording and a gendered term”).

<sup>13</sup> June 7, 2021 Response to Office Action at TSDR 60-93. The dates of access of the website evidence appears omitted. The Examining Attorney did not object in the July 27, 2021 Office Action and addressed this evidence in the brief. Therefore, any objection to our consideration of this material has been waived. *In re I-Coat Co., LLC*, 126 USPQ2d 1730, 1733 (TTAB 2018).

with restaurant services and alcoholic beverages as evidence of commercial weakness of TAO under the sixth *DuPont* factor). See also *Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005) (the purpose of a defendant introducing third-party uses is to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different such marks on the bases of minute distinctions.’”) (citation omitted).

The uses are as follows:

Third-party use	Services	Location
	General contractor, home renovation and handyman service	Capital Heights, MD
	Licensed general contractor	Lafayette, LA
Patch Construction	Construction	Surprise, AZ
Patch Construction Inc.	General Contractor	Madison, WI
	Contractor	Saratoga, NY
	Drywall contractor	Bothell, WA

Third-party use	Services	Location
	Drywall repair	Southwest Florida
	Drywall & remodeling services	Colorado Springs, CO
	Patch & repair, new construction and painting	Anchorage, AK
	Home repair, maintenance and handyman services	Austin, TX
<p>Doctor Patch</p>	Residential and commercial contractor for services that include repairs, reconstruction and drywall	Irvine, CA
	Professional plaster and drywall repair services	Cedar Rapids, IA
	General contractor drywall repair, drywall remodeling, drywall patching	Nashville, TN

Third-party use	Services	Location
Fast Patch Drywall Repair, LLC	Building finishing contractor	Aurora, CO
E&M Patch Repair	General contractor	Puyallup, WA

The above uses tend to show consumer exposure to third-party use of the descriptive term PATCH in the building and construction field and that consumers of the registered building and construction services will look not just to the PATCH component of marks containing the term to identify and distinguish source, but also to the other parts of the marks.

As a whole, the dictionary definition, the third-party registration, and third-party use evidence submitted by Applicant of PATCH-formative marks or trade names are probative of conceptual and commercial weakness of the term PATCH for goods and services in the building and construction industry. *Juice Generation*, 115 USPQ2d at 1674.

As to the strength of MAN, the other part of the cited mark, PATCHMAN, this term is defined as “: an individual human : *especially* an adult male human.” (emphasis in original).<sup>14</sup> The term “man” itself is conceptually weak as it is highly suggestive of the person who is performing the services. *See e.g., Parfums de Coeur, Ltd. v. Lazarus*, 83 USPQ2d 1012, 1017 (TTAB 2007) (“BODYMAN clearly refers to the ‘person’ depicted in the design element, a cape-wearing superhero who is merely

a torso or ‘body’”); *Blue Man Prods., Inc. v. Tarmann*, 75 USPQ2d 1811, 1820 (TTAB 2005) (the mark BLUE MAN GROUP has the connotation of the appearance of the performers).

A number of the third-party uses set forth above combine PATCH with the identification of the person or persons patching, or applying the patch. More specifically, the record shows that consumers encounter the name of a person (Tom’s Patch and Repair), use personified terms (Mr. Patch, Dr. Patch, Patch Doctors), or suggest a reference to people (Patch Pros) so that the public is familiar with this personification in connection with the term PATCH in the construction field.<sup>15</sup>

We find that the term PATCH is conceptually and commercially weak, that the term MAN is highly suggestive of the entity or individual performing the patch services, and that PATCHMAN as a whole is highly suggestive and entitled to a narrow scope of protection. *See In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150, 1154 (TTAB 2012) (“GRAND HOTEL is highly suggestive, and therefore the scope of protection to which the cited registration is entitled is quite limited.”).

“Where a party uses a weak mark, his competitors may come closer to his mark than would be the case with a strong mark without violating his rights.” *Sure-Fit Prods. Co. v. Saltzson Drapery Co.*, 254 F.2d 158, 117 USPQ 295, 297 (CCPA 1958).

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<sup>15</sup> The Examining Attorney does acknowledge that some of the uses “feature a combination of the ‘PATCH’ descriptive wording and a gendered term.” Examining Attorney’s brief, 8 TTABVUE 16. Although the Examining Attorney points out that there is no evidence of another PATCHMAN registration or third-party use, the third-party use evidence shows common use of PATCH in combination with terms identifying the performers of the services. Nothing in the record indicates that the use of the gender reference MAN is a memorable distinction for the prospective consumer.

*See also Juice Generation*, 115 USPQ2d at 167 (“The weaker [a registrant’s] mark, the closer an applicant’s mark can come without causing a likelihood of confusion and thereby invading what amounts to its comparatively narrower range of protection.”).

The weakness of the cited mark means that it is entitled to a lesser scope of protection and favors a finding of no likelihood of confusion.

We now turn to the first *DuPont* factor which considers the similarity or dissimilarity of the marks. *DuPont*, 177 USPQ at 567. For convenience, we repeat



that Applicant’s mark is  (“patch” disclaimed) and the cited mark is PATCHMAN. Our analysis of Applicant’s mark and the cited mark cannot be predicated on dissecting the marks into their various components; the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

As indicated, if the matter shared by the two marks is highly suggestive, merely descriptive, or commonly used or registered in the industry for similar goods or services, it has been found that the addition of a different term to each mark may avoid confusion and distinguish it from the other mark. *See In re Bed & Breakfast Registry*, 791 F.2d 157, 229 USPQ 818, 819 (Fed. Cir. 1986) (“The record shows that a large number of marks embodying the words ‘bed and breakfast’ are used for similar reservation services, a factor that weighs in favor of the conclusion that BED & BREAKFAST REGISTRY and BED & BREAKFAST INTERNATIONAL are not rendered confusingly similar merely because they share the words ‘bed and

breakfast.”); *In re Hartz Hotel Servs., Inc.*, 102 USPQ2d at 1154 (numerous third-party uses of GRAND HOTEL marks for hotel services show that consumers distinguish between these marks even though the only distinguishing element is the addition of a geographic location to the word GRAND HOTEL).

Keeping this in mind, we find in this case that Applicant’s mark and the cited mark are sufficiently different to avoid likelihood of confusion. As we have already found, PATCHMAN is highly suggestive, and therefore the scope of protection to which this cited registration is entitled is quite limited.

Considering the marks in their entireties and in view of the weakness of the cited mark, we find the addition of the terms THE and BOYS and the design element in Applicant’s mark is sufficient to render Applicant’s mark distinguishable from the PATCHMAN mark in the cited registration. *See In re Cooper’s, Inc.*, 163 USPQ 656, 657 (TTAB 1969) (“although the designations ‘YOUNG GUY’ and ‘WEE GUYS’ may engender similar meanings, the substantial differences between them in both sound and appearance is sufficient, in view of the nature of such marks, to obviate any likelihood of confusion”); *J.F.G. Coffee Co. v. Hafner*, 133 USPQ 693, 694-695 (TTAB 1962). *See also Juice Generation*, 115 USPQ2d at 1674 (an applicant may come closer to a weak mark without causing a likelihood of confusion); *In re Hunke & Jochheim*, 185 USPQ 188, 189 (TTAB 1975) (“the addition of other matter to a highly suggestive or descriptive designation, whether such matter be equally suggestive or even descriptive, or possibly nothing more than a variant of the term, may be sufficient to distinguish between them so as to avoid confusion”).

The first *DuPont* factor favors a finding of no likelihood of confusion.

B. Similarity or Dissimilarity of Services

We next consider the second *DuPont* factor, “[t]he similarity or dissimilarity and nature of the goods or services as described in an application or registration.” *DuPont*, 177 USPQ at 567. Our comparison is based on the services as identified in Applicant’s application and the cited registration. *See Stone Lion Cap. Partners v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *M2 Software, Inc. v. M2 Commc’ns, Inc.*, 450 F.3d 1378, 8 USPQ2d 1944, 1947 (Fed. Cir. 2006)) (in reviewing the second *DuPont* factor, “we consider the applicant’s goods as set forth in its application, and the opposer’s goods as set forth in its registration.”).

During prosecution, the Examining Attorney argued relatedness based on the now deleted “general construction contracting services” listed in the cited registration. On appeal, the Examining Attorney argues that the third-party use evidence establishes that “construction, remodeling, and repair, as well as drywall repair and general construction contracting are often rendered by the same construction companies” and are “highly related.”<sup>16</sup> The Examining Attorney also argues that the 37 third-party registrations that he introduced show that the services at issue “are of a kind that may emanate from a single source under a single mark.”<sup>17</sup> The Examining Attorney points out that Applicant has not contested this point.

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<sup>16</sup> Examining Attorney’s brief, 8 TTABVUE 12, 13.

<sup>17</sup> Examining Attorney’s brief, 8 TTABVUE 12.

The Examining Attorney’s third-party registration evidence<sup>18</sup> includes the following registrations (relevant services in bold):

Registration No.	Mark	Services
Reg. No. 4373907	CUSTOM DESIGN TEAM INC.	Services include: <b>Drywall contractor services; General contractor services</b> , namely, plumbing, heating and air conditioning, carpentry, <b>drywall</b> , painting, electrical, building and framing contractor services; <b>Residential and commercial building construction</b>
Reg. No. 5287704	PATCHMASTER	Services include: Construction and repair of buildings; <b>Drywall and painting contractor services; Drywall contractor services</b> ; House building and repair; Painting of drywall repairs; Repair of masonry walls and structures; <b>Building construction and repair</b> ; Installing drywall panels

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<sup>18</sup> November 30, 2021 Office Action at TSDR 2–116. Some of these third-party registrations, not listed here, are not relevant, as they do not cover services identified in both the involved application and the cited registration with its now amended identification. *See Made in Nature, LLC v. Pharmavite LLC*, 2022 USPQ2d 557, at \*46 (TTAB 2022) (finding third-party registrations have no or low probative value because they do not show both opposer’s and applicant’s types of goods under the same mark).

Registration No.	Mark	Services
Reg. No. 5424995	AXECAL	Services include: <b>Drywall contractor services; Building construction and repair;</b> General contractor services, namely, plumbing, heating and air conditioning, carpentry, <b>drywall</b> , painting, electrical, building and framing contractor services; Installing drywall panels
Reg. No. 5925484	WEATHERTECH GENERAL CONTRACTING	Services include: <b>Building construction, remodeling and repair; Drywall contractor services; General construction contracting</b>
Reg. No. 6204461	ADS ABATEMENT & DEMOLITION SERVICES	Services include: <b>building construction, remodeling and repair;</b> construction and renovation of buildings; construction and repair of buildings; <b>drywall contractor services;</b>
Registration No. 2947352	team <b>CIS</b>	Services include: <b>Building construction and repair;</b> building demolition; carpentry contractor services; construction management supervision; custom construction and building renovation; <b>drywall contractor services</b>

Registration No.	Mark	Services
Registration No. 3602179		Services include: <b>Building construction and repair; Building construction services;</b> Building construction supervision; <b>Building construction, remodeling and repair;</b> Building maintenance and repair; Construction and repair of buildings;; <b>Drywall contractor services</b>
Registration No. 4224154	REBORN CABINETS	Services include: <b>Building construction; Building construction and repair; Building construction services;</b> <b>Drywall and painting contractor services;</b> <b>Drywall contractor services</b>

Third-party registrations that individually cover different services and are based on use in commerce serve to suggest that the listed services are of a type that may emanate from a single source. *See Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988) (although third-party registrations are “not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, [they] may nonetheless have some probative value to the extent that they may serve to suggest that such goods or services are of a type which may emanate from a single source”). *See also In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1786 (TTAB 1993).

The Examining Attorney also submitted third-party use evidence from a handyman and home remodeling business, Husband For a Day (husband4aday.com), that offers, among other things, drywall and repair services; and Done Right Home Pros (donerighthomepros.com) that offer home improvement and repair services that include drywall and plaster services.<sup>19</sup> Some of Applicant's third-party use evidence, discussed *supra*, shows overlap of Applicant's and Registrant's services. Mr. Patch and Repairs (facebook.com/mrpatchandrepairs) offers sheet rock repairs, general home repairs, and home remodeling; Doctor Patch (doctorpatch.us) offers drywall repairs and repairs for residential and commercial property; and Patch Perfect Drywall and Repair (drywallrepairnashvilletn.com) offers drywall patching, drywall repair and drywall remodeling installations.<sup>20</sup> This evidence is relevant to the relatedness of Applicant's and Registrant's services as it shows companies offering services of the same type as those offered by Applicant and Registrant under the same mark or trade name. *See e.g., In re Embiid*, 2021 USPQ2d 577 at \*28-29 (TTAB 2021) (finding internet website evidence showing clothing companies that sell shoes, sweatshirts and shirts under the same mark as evidence that customers are accustomed to seeing shoes and clothes sold under the same mark).

We find Applicant's and Registrant's services related. The second *DuPont* factor favors a finding of likelihood of confusion.

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<sup>19</sup> June 1, 2022 Denial of Reconsideration at TSDR 2-4, 8-9.

<sup>20</sup> May 31, 2022 Request for Reconsideration at TSDR 55-56, 58.

### C. Applicant's Prior Registrations

Applicant has referenced its prior registrations (THE PATCH BOYS and [REDACTED]) as a consideration under the thirteenth *DuPont* factor,<sup>21</sup> which examines “any other established fact probative of the effect of use.” *DuPont*, 177 USPQ at 567. Rarely invoked, the thirteenth *DuPont* factor is intended to accommodate “the need for flexibility in assessing each unique set of facts.” *In re Strategic Partners*, 102 USPQ2d 1397, 1399 (TTAB 2012), *aff'd* mem., (Fed. Cir. Sept. 13, 2019). “Where an applicant owns a prior registration that is over five years old and the mark is substantially the same as in the applied-for application, this can weigh against finding that there is a likelihood of confusion.” *In re Inn at St. John's, LLC*, 126 USPQ2d 1742, (TTAB 2018) (citing *In re Strategic Partners Inc.*, 102 USPQ2d at 1399).

However, this factor comes into play where confusion is likely. As indicated, we are reversing the Section 2(d) refusal of the Examining Attorney, and therefore, need not address the thirteenth *DuPont* factor. *Cf. Lincoln Nat'l Corp. v. Anderson*, 110 USPQ2d 1271, 1282 n.16 (TTAB 2014) (Board did not reach the issue of fame under the fifth *DuPont* factor “in view of findings under the other relevant *du Pont* factors which clearly suffice to support a conclusion that confusion is likely”).

## II. Conclusion

Although we find the services related, in view of the narrow scope of protection afforded the cited mark, we find confusion is unlikely.

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<sup>21</sup> Applicant's brief 6 TTABVUE 14-17; Applicant's reply brief, 9 TTABVUE 7-10.



**Decision:** The Section 2(d) refusal to register Applicant's mark is reversed.